No. 12818

United States Court of Appeals

For the Ninth Circuit

SETH J. A. WELDON and DOROTHY WELDON,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

Appeal from the United States District Court for the Southern District of California, Southern Division.

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TOPICAL INDEX

Page

Grounds of Petition 1

Arguments and Authorities 2

Point I.—Minute Order Need Not Have Been Noted in Civil Docket 2

Basis of Court's decisions 2

Remedies Which Were Available to Appellants in District Court 3

Appellants' Motions in District Court were authorized by the Rules of Criminal Procedure 5

Federal Rules Contain No Provision for Entry of an Order made Pursuant to motion under Rule 41 (e) of Federal Rules of Criminal Procedure in the Civil Docket 8

Points II and III.—Minute Order Need Not Have Been Signed by Judge; Inclusion of Minute Order in Record Prepared by Clerk Raises Presumption of Regularity 10

Certificate of Attorneys 11

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Burdeau vs. MacDowell, 256 U. S. 465 3
Dowling vs. Collins, (6th Cir.) 10 F. (2d) 62 3
Go-Bart Importing Co. vs. United States, 282 U. S. 344 3
Goodman vs. Lane, (8th Cir.) 48 F. (2d) 32 3
In re Milburne, 77 F. (2d) 310 3
In re Sana Laboratories, 115 F. (2d) 717 3
Kam Koon Wan vs. E. E. Black, Ltd., (9th Cir.) 182 F. (2d) 146 2
McAuliffe vs. Coughlin, 105 Cal. 268 7
Perlman vs. United States, 247 U. S. 7 3
Schoenfeld vs. Gerson, 48 Cal. App. (2d) 739 7
Uhl vs. Dalton, (9th Cir.) 151 F. (2d) 502 2
United States vs. Poller, 43 F. (2d) 911 3
Wright vs. Gibson, (9th Cir.) 128 F. (2d) 865 2

Codes, Statutes, etc.

California Code of Civil Procedure
  Section 167 American Jur. page 172 10
  Section 1003 7
  Section 1963, Subd. 15 10
Federal Rules of Civil Procedure
  Rule 1 5
  Rule 2 5
  Rule 41 (e) 5, 6, 7, 9
  Rule 58 .... 5, 8
  Rule 79a 5

United States
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SETH J. A. WELDON and DOROTHY WELDON, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	}	No. 12818

Petition for Rehearing

Appeal from the United States District Court for the Southern District of California, Southern Division.

Each of the appellants, SETH J. A. WELDON and DOROTHY WELDON, respectfully petitions the Court for a rehearing of the above-entitled matter and to set aside the decision and judgment of the above-entitled Court filed herein May 17, 1952, whereby the appeal of each of appellants was dismissed.

Grounds of Petition:

The grounds of the Petition for Rehearing are that the Court erred in holding—

1. That the law or rules require that the so-called minute order (of December 8, 1950) be noted in the civil docket of the district court.

2. That the "record does not show that the district court or any judge thereof wrote or filed the so-called minute order or caused it to be written or filed or directed that it be entered."

3. That said minute order cannot be regarded as an order of the district court.

ARGUMENTS AND AUTHORITIES

POINT I.

MINUTE ORDER NEED NOT HAVE BEEN NOTED IN CIVIL DOCKET

Basis of Court's decisions:

The basis of the Court's decision is that the notices of motion and motions filed by each of the appellants were in effect civil actions, requiring compliance with the rules of civil procedure of the district court as to making and entry of the minute order of the court as if it amounted to a judgment. Appellants urge that that is a fundamental error in this Court's opinion.

The cases cited by the Court in the footnotes appended to the opinion, namely,

Wright vs. Gibson, (9th Cir.) 128 F. (2d) 865;
Uhl vs. Dalton, (9th Cir.) 151 F. (2d) 502;
Kam Koon Wan vs. E. E. Black, Ltd., (9th Cir.) 182 F. (2d) 146,

were civil actions pure and simple. Neither case is an exact precedent for the order of dismissal of the appeal made in the case at bar.

Remedies Which Were Available to Appellants in District Court:

That the appellants had available to them several allowable courses of procedure to bring about the return of their property is established by many adjudicated cases:

> *United States vs. Poller,* 43 F. (2d) 911;
> *Perlman vs. United States,* 247 U. S. 7;
> *Burdeau vs. MacDowell,* 256 U. S. 465;
> *In re Milburne,* 77 F. (2d) 310;
> *In re Sana Laboratories,* 115 F. (2d) 717;
> *Go-Bart Importing Co. vs. United States,* 282 U. S. 344.

Said cases, particularly illustrate instances where the moving parties proceeded sometimes by motion and sometimes by order to show cause.

Undoubtedly they may file an independent action in equity, as was done in

> *Dowling vs. Collins,* (6th Cir.) 10 F. (2d) 62.

One of the leading cases in which mention is made of the available courses of procedure is

> *Goodman vs. Lane,* (8th Cir.) 48 F. (2d) 32.

In said case, it is stated (page 35):

> "2. Under certain circumstances, a summary motion may be made in United States District Court which has control of the preparatory and preliminary acts and steps leading up to a criminal prose-

> cution of the owner of the property. The full and complete relief, however, afforded by such motion is equitable in character. It consists in enjoining the officers from making use of the property as evidence, and in ordering the property restored to its owner. See Go-Bart Importing Co. vs. United States, 282 U. S. 344. That case, however, did not hold that a plenary bill in equity was not a proper method of procedure."

In said case (page 35), the court discusses the propriety of the common law remedy of replevin, holding that it would appear that replevin is forbidden by a federal statute; but the court says further (page 35):

> "5. The questions of return of property illegally seized, and/or the suppression of the same as evidence, are presented to the courts by various methods of procedure. There is no uniformity throughout the several circuits, and oftentimes not within the same circuit. Independent petitions, either before or after criminal proceedings are started, summary motions or petitions in criminal cases after indictment or information, independent bills in equity, are all recognized by the courts as proper. The practitioner will doubtless choose the method which best suits his particular case. Delays may arise in any method of procedure. But as criminal cases are given precedence in the trial and appellate courts, doubtless bills in equity closely related to criminal cases could secure like precedence. But however this might be, the jurisdiction of the federal equity court cannot be made to depend upon such considerations."

This Court's decision dismissing our appeal is erroneous unless it be true that our motions for return and suppression of evidence amounted to civil actions. Unless said motions did amount to civil actions, it would appear to appellants that there is no basis whatever for requiring compliance with Rules 58 and 79 (a) of the Federal Rules of Civil Procedure.

The scope of said Rules of Civil Procedure is stated in Rule 1 thereof:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 2 provides:

> "There shall be one form of action to be known as 'civil action.' "

Appellants' Motions in District Court were authorized by the Rules of Criminal Procedure:

Rule 41 (e) of the Federal Rules of Criminal Procedure of the United States District Court reads as follows:

> "*Motion for return of property and to suppress evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground

that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

An enlightening comment on said rules is found in the notes of the advisory committee on rules appended to said Rule 41 (e), appearing in Title 18 U. S. C. A. Federal Rules of Criminal Procedure at page 463 as follows:

"This rule is a restatement of existing law and practice, with the exception hereafter noted, 18 U. S. C. A. former sections 625, 626; Weeks vs. United States, 232 U. S. 383; Silverthorne Lumber Co. vs. United States, 251 U. S. 385; Agnello vs. United States, 269 U. S. 20; Gouled vs. United States, 255 U. S. 298. While under existing law a motion to suppress evidence or to compel return of property obtained by an illegal search and seiz-

ure may be made either before a commissioner subject to review by the court on motion, or before the court, the rule provides that such motion may be made only before the court. The purpose is to prevent multiplication of proceedings and to bring the matter before the court in the first instance. While during the life of the Eighteenth Amendment when such motions were numerous it was a common practice in some districts for commissioners to hear such motions, the prevailing practice at the present time is to make such motions before the district court. This practice, which is deemed to be preferable, is embodied in the rule."

Since said Rule 41 (e) permits the making of the motions which appellants did make in the district court, the question arises as to what is a motion. The general understanding of the bar as to the nature of a motion, as distinguished from an action, is expressed in the definition of a motion in Section 1003, California Code of Civil Procedure as follows:

"An application for an order is a motion."

An order is defined by the same section as follows:

"Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is denominated an order."

A notice of motion is equivalent to an order to show cause.

McAuliffe vs. Coughlin, 105 Cal. 268;
Schoenfeld vs. Gerson, 48 Cal. App. (2d) 739.

Federal Rules Contain No Provision for Entry of an Order made Pursuant to motion under Rule 41 (e) of Federal Rules of Criminal Procedure in the Civil Docket:

Rule 58 of the Rules of Civil Procedure applies in words to the instances where the clerk may enter judgment and to the other instances where judgment must be ordered by the judge; and neither that rule nor Rule 79 (a) has any just application to our case.

After a careful examination of the Rules of Criminal Procedure, we find no provision for entry of any order of the court in the civil docket or elsewhere; and said rules do not provide, so far as we can learn, for the signing of any orders by the court. Certainly our long experience at the bar teaches us that customarily minute orders are not signed by judges. As a matter of fact, historically speaking, the judgment of the court need not be signed unless expressly provided for by statute or rule.

The suggestion of this Honorable Court made at the time of the oral argument in Los Angeles that such motions as appellants made before the district court must have been ancillary to some other proceeding is not well taken. There are too many instances where the district court and other Federal courts have entertained such motions, often entirely independent of any other proceedings, to justify that contention.

Furthermore, the holding of this Honorable Court that the order must have been entered in the judgment docket as a judgment has taken us all by surprise. The

augmented record before this court will not disclose the payment of any filing fees by appellants for the filing of their motions; and in fact no such fees were paid.

It is pointed out that in instances where parties have filed motions before United States commissioners for return of seized property, it could not possibly be held that such motions amounted to civil actions. The United States commissioner is not even a judge; and his proceedings are not proceedings before a court. No argument is needed to establish these facts.

A review of such proceedings before the United States commissioner by the district court would not make a civil action out of said proceedings either.

How then can it be contended that the making of such a motion, pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, converted such a motion into a civil action requiring compliance with the Rules of Civil Procedure as to entry of a judgment?

POINTS II AND III.

MINUTE ORDER NEED NOT HAVE BEEN SIGNED BY JUDGE; INCLUSION OF MINUTE ORDER IN RECORD PREPARED BY CLERK RAISES PRESUMPTION OF REGULARITY.

If our Point I is well taken, it will be unnecessary to consider our Point II and III as above stated.

If the minute order of the court was not a judgment and if the motions were not civil actions, then we need not consider whether the signature of the judge was required.

In that event, presumptions of law will furnish the complete answer:

The inclusion of the minute order of December 8 in the record on file in this case, under the certificate of the clerk, raises the presumption that said order was made by the judge and was regular in every way.

> Section 1963 California Code of Civil Procedure, Subd. 15;
> Section 167 American Jurisprudence, page 172.

Innumerable instances could be cited to this court where the presumption of regularity of judicial proceedings has been indulged; and certainly this court will indulge that presumption and will hold that the minute order in question was an order made and directed by the judge of the district court, provided the

court agrees with appellants that said order did not amount to a judgment in a civil action.

Respectfully submitted

CLARENCE HARDEN
CRANDALL CONDRA
Attorneys for Appellants.

CERTIFICATE OF ATTORNEYS

We, CLARENCE HARDEN and CRANDALL CONDRA, attorneys for appellants, hereby certify that the foregoing Petition for Rehearing is, in our judgment, well taken, and that it is not taken or made for delay.

Clarence Harden
Crandall Condra